

BEFORE THE UNITED STATES FOOD AND DRUG ADMINISTRATION

In re: United Egg Producers, Inc.)
 Sauder, R.W., Inc.)
 Eggland's Best, Inc.)
 Giant Food, Inc.)
 Albertson's, Inc.)
 Ken Klippen)

Docket No. 2003P-0270/CP1

**SECOND SUPPLEMENTAL FILING TO THE CITIZEN PETITION TO
PROHIBIT FALSE AND MISLEADING ADVERTISING**

* * *

Submitted to:

Dockets Management Branch
Food and Drug Administration, Room 1061
5630 Fishers Ln.
Rockville, MD 20852

On: February 27, 2004

Submitted by:

Compassion Over Killing, Inc., representing 5,000 persons nationwide
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2003P-0270

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On June 11, 2003, Petitioners filed an initial "Citizen Petition to Prohibit False and Misleading Advertising," which contained exhibits 1-16 in support of our case. On August 15, 2003, Petitioners filed a supplemental filing that contained exhibits 17-19. Petitioners now submit our second supplemental filing with new and relevant evidence (exhibits 20-24). Also, Petitioners understand that the United Egg Producers, Inc. (UEP), the named party responsible for the labeling at issue, has made certain arguments against government action to correct this deceptive labeling in other forums. We would like to briefly address those here on the assumption that they were made to the FDA.

The Petitioners submit this supplemental filing under 21 C.F.R. § 10.30(g) and request action by the FDA in accordance with its statutory authority under sections 201(n), 301, and 403(a) of the Federal Food Drug and Cosmetics Act, 21 U.S.C. sections 321(n), 331, and 343(a). The Petitioners respectfully request the Commissioner of Food and Drugs to issue the Petitioners' proposed order or take any other form of administrative action deemed appropriate to prevent further use of United Egg Producers' "Animal Care Certified" seal, logo, terms, or an approximation thereof in the labeling of eggs sold for consumer consumption.

Petitioners claim categorical exclusion from EA or EIS requirements under 21 C.F.R §§ 25.30(a), (k), or any other exclusion deemed applicable. The Petition, first supplement, and this second supplement comply with the categorical exclusion criteria and no extraordinary circumstances exist that require submission of an EA or EIS. Additional Evidence Not Previously Available

January 21, 2004, Survey by Zogby International

On January 21, 2004, Zogby International, Inc., released a report of a market research survey conducted between January 13-19, 2004. The survey was conducted in strict accordance with the Manual for Complex Litigation, 3rd Edition, written by the Federal Judicial Center (available at www.fjc.gov). The survey consisted of 212 face-to-face interviews of the relevant population in Oakland, CA and Chicago, IL, chosen at random in areas frequented by egg purchasers. See Ex. 20 (Zogby Report 1/21/04, Survey, and Interviewer Instructions). The respondents were asked a series of closed and open-ended questions with controlled exposure to the relevant label and a control group. In its executive summary Zogby reports:

Respondents were more likely to believe that the Animal Care Certified logo indicates more humane care for the hens who laid those eggs. When shown two cartons, one with the logo and one without the logo, respondents were more likely to believe that eggs sold in cartons without the logo over those sold in cartons with the logo, indicated hens who are caged during the process. And, by more than two to one, respondents thought that eggs sold in cartons with the logo over those sold in a carton without the logo, meant that the hens were free-range or free-roaming. Before respondents were asked any questions about how the hens are confined, by nearly two to one, respondents said they were more likely to purchase eggs sold in cartons with the Animal Care Certified logo than eggs in cartons without the logo, although one in three said they would purchase either. After asking two questions regarding how hens are confined during the process, half say they are more likely to purchase eggs sold in cartons with the logo. This is nearly seven times as many who said

they are less likely to purchase eggs in cartons with the logo, and twice as many who said it would make no difference which carton of eggs they would purchase.

We submit that the results of this survey, both in conjunction with the three previously submitted surveys and standing on its own, constitutes overwhelming evidence that the advertisers are materially misleading consumers. See Kraft, Inc. v. FTC, 970 F.2d 311 (7th Cir. 1992) (involving use of just this type of survey to establish false advertising); Chrysler Corp. v. FTC, 561 F.2d 357, 363 (D.C. Cir. 1977) (“A secondary message understood by reasonable consumers is actionable if deceptive even though the primary message is accurate.”). Based on the ads, consumers reasonably assume a higher level of care than is actually the case, and rely on it.

According to the UEP, “Egg producers representing more than 200 million layers nationwide or 80 percent of the industry have signed on to participate in the program.” ACC is a national ad campaign that is affecting virtually every egg consumer in the nation.

November 24, 2003, Press Release by the NAD

On November 24, 2003, national news wires carried a story regarding the National Advertising Division’s released decision on the ACC claims. See Ex. 21. Due to the nature of those proceedings we cannot discuss the findings or current status but ask that the Commissioner consider this decision and its significance.

September 11, 2003, Letter from UEP Scientific Committee Member Adele Douglass

On September 11, 2003, Adele Douglass, who was a member of the UEP Scientific Advisory Committee on Animal Welfare (UEP’s Ex. G), wrote to the *Washington Post* “[w]e do agree with Paul Shapiro of Compassion Over Killing that the meaning of the

United Egg Producers' "Animal Care Certified" label should be explained to consumers. HFAC's Certified Humane *label* is clearly defined [on the packaging]. . . ." See Ex. 22 (emphasis added). While we feel that UEP's purported substantiation (discussed below) does not relate to its claims, a member of its own committee has admitted that the ACC logo is misleading. The UEP cannot claim that the committee supports its use of the logo.

The UEP's Arguments

In certain other forums, the UEP has made arguments to counter those in the Petition.¹ We assume they have made the same arguments to the FDA and would like to briefly respond here.

The UEP has argued that the USDA's Food Safety Inspection Service (FSIS), among other government agencies, have approved the ACC logo. In fact, the FSIS responded to our petition by stating that "[t]he labeling of shell eggs (with the exception of labeling that indicates that refrigeration is necessary) is regulated by the Food and Drug Administration" in declining to act on our petition for lack of jurisdiction. See Ex. 24, paragraph 3.

It is our position that regulatory oversight over general labeling, pre-market, does not insulate a seller from being found to engage false advertising. Indeed, no seller of consumer products could ever be said to engage in false advertising if that were the case because all products require some sort of official inspection. It is, of course, not the case.

¹ While the UEP has made several untrue statements in its attack on Petitioner Compassion Over Killing, Inc., they are not relevant to this case and we will not waste the FDA's time by addressing them here. As noted previously, Petitioners have filed with other government agencies with concurrent jurisdiction. The Petitioners recently received a letter from the New York Attorney General's Office which states that "despite our efforts, the company has refused to make any refund or other adjustment." See Ex. 23.

See Bristol-Meyers, Co. v. FTC, 738 F.2d 554, 560 (2nd Cir. 1984). This is logical because there is no way for regulatory agencies to be sure what impressions consumers will take away from the products once they are on the shelves.

This is doubly true in this particular case because no agency went through a “notice and comment” procedure to test the public’s perception of these terms, logos, ads, etc., as the USDA and other agencies have felt the need to do in other cases. See 63 FR 57624, October 28th, 1998 Proposed Rule; Request for Comments on Issue Papers (regarding regulations on confinement of animals before an advertiser may use the term “organic”); 67 F.R. 79552 (notice and request for comments on USDA proposed animal production claims).

Petitioners have now provided evidence of that consumer perception and respectfully request that the FDA exercise its statutory authority.

Quite simply, Petitioners are just asking the advertisers to take off the label, or explain in the label what it means. That’s all. This simple fact, and their unwillingness to do this, exposes their intent to deceive consumers.

The UEP has essentially argued that the express or implied representation conveyed by the ACC logo is that the production methods of ACC eggs comply with UEP animal husbandry guidelines. This statement is unsupported by any evidence and is contradicted by the substantial surveys and other evidence that Petitioners have provided. Quite simply, if UEP wanted to make this representation to consumers, it would have said “complies with UEP animal husbandry guidelines” or something to that effect, and made the guidelines available. Instead, the UEP chose to use the vague phrase “animal care certified” because of its implied representations.

The UEP's Alleged Substantiation Does Not Relate to Its Claims²

The UEP has essentially organized a committee and accepted that committee's recommendations on farm husbandry practices. It now proposes that the committee's husbandry practice findings somehow substantiate every express and implied, subjective and objective, claim reasonable consumers receive from their advertising. This is nonsensical and does not reflect the concept of substantiation in false advertising law.

The apparent express, objective claim made by the logo is that the animals are cared for and that this is certified, and the substantiation to which the advertisers refer does not support this. As discussed in the Petitioners' initial complaint, the term "care" refers to attentive assistance, while the term "certified" refers to official government inspection and evaluation, and cannot be used without closely associating it with the name of the organization responsible for the "certification" process.³

But the UEP's claims go well beyond this. As shown by the survey evidence, consumers reasonably interpret a specific set of conditions when seeing the logo. The UEP knew or should have known it was making certain implied claims because it published its guidelines in October 2000, one month after the initial Zogby poll, which ran on Reuters and CNN, showed what consumers expected in terms of husbandry conditions for egg-

² The UEP has produced no evidence that substantiates the claims consumers are receiving, implied or otherwise. There is no way for the FDA or the Petitioners to establish what the Scientific Committee actually determined, what specific strictures it operated under, or how Committee members reached their conclusions. See "UEP Guidelines," pp. 2-3 (referring to the Committee being asked to review literature on "specific topics" and developing recommendations based on *existing* management and husbandry practices—with no option for cage-free systems; See Janice Swanson, Ph.D., "Comparison of Industry Guidelines: The Role of Values," a speech given at the "Future Trends in Animal Agriculture" conference at the USDA on May 28, 2003.).

³ See FSIS's "Meat and Poultry Labeling Terms," updated January 2001 (<http://www.fsis.usda.gov/oa/pubs/lablterm.html>); Backgrounder "Using the Claim 'Certified Organic By...' on Meat and Poultry Product Labeling," updated March 2, 2000 (<http://www.fsis.usda.gov/oa/background/organic.html>) ("Backgrounder"); Federal Register: April 12, 1999 (Volume 64, Number 69).

laying hens.⁴ The UEP is responsible for substantiating these implied claims, but, of course, cannot because the husbandry conditions are opposite to what the consumer expects. See FTC Policy Statement on Advertising Substantiation, 48 Fed. Reg. 10,471 (1984) (“Although firms are unlikely to possess substantiation for implied claims they do not believe the ad makes, they should generally be aware of reasonable interpretations and will be expected to have prior substantiation for such claims.”).

As discussed in the initial filing, an interpretation will be presumed reasonable and material if it is the claim the advertiser attempted to convey. Petitioners feel that the background and entire history of this program suggests that the UEP intended to convey a deceptive message.⁵ It is possible it did this because the program benefits the industry by increasing egg prices via a reduced flock.⁶ Regardless of whether materiality is

⁴ As discussed previously, the September 2000 Zogby International poll of U.S. consumers showed that 75.4 percent of respondents found it unacceptable to starve hens for more than one week to induce molting, that 86.2 percent of respondents found it unacceptable to densely crowd hens in cages, and that 60.4 percent of respondents found partially removing hens’ beaks was unacceptable. See note 7.

⁵ On September 20, 2000, the Reuters news agency ran an article on its national wire about a nationwide Zogby poll on American attitudes toward standard egg industry practices. The story was covered by many media outlets, including CNN. See “Poll: U.S. citizens support humane treatment for egg-laying hens,” Sept. 20, 2000, <http://www.cnn.com/2000/FOOD/news/09/20/food.hens.reut/>. The Reuters article specifically mentioned that the majority of Americans oppose two standard egg industry practices: 1) the overcrowding hens in wire “battery cages” to the point where they do not have enough space to flap their wings and 2) “forced molting,” a complete feed-withdrawal practice whereby hens starve for up to two weeks in order to induce a new laying cycle. Not mentioned in the article, but cited in the Zogby poll, is the practice of removing part of the unanesthetized birds’ beaks with a hot blade to avoid some of the aggression-related consequences of intensive confinement. See <http://www.eggscam.com/poll.php> for the full poll.

It is highly improbable that the United Egg Producers—the premiere trade organization for the U.S. egg industry—would have not known about this poll and its national media coverage.

⁶ The ACC program addresses an oversupply problem which had been plaguing the egg industry with low prices for years. The editor of one industry journal wrote in the *Gainesville Times*, “For years, egg companies admitted that overproduction had been the root of the profitability problem, but were slow to react.” See Chris Hill, “Rules result in increase of prices,” *Gainesville Times*, September 17, 2003. Indeed, an article in *Poultry Times* entitled, “Animal Welfare Guidelines Aid Profitability,” noted that the ACC guidelines “have had a secondary and welcomed effect—that of increased profitability.” See Barbara Olejnik, “Animal welfare guidelines aid profitability,” *Poultry Times*, September 15, 2003.

presumed, it is born out by the evidence and the USDA has recently admitted that there is a rising demand specifically for ACC eggs.⁷

Even assuming the UEP's substantiation related in some way to the claims it makes, it is simply contradicted by the weight of expert opinion. See Exs. 15, 16, 18. The UEP guidelines in most areas tend to be vague recommendations, not inviolable rules.

The Petitioners' survey (Exs. 11-A and 11-B) presented the logo along with a control to randomly selected egg consumers, and with questions that merely reflect the actual empirical conditions under the UEP Guidelines, tested the logo's effect.⁸ The survey takers in no way identified themselves or influenced the respondents, who filled out the surveys on their own. The results speak for themselves and, to the extent they can be impeached, have been replicated in two subsequent surveys administered by a respected independent market research organization. They show beyond a doubt that consumers' actual interpretation of the logo is that the birds are given a higher standard of treatment than is actually the case.

In our initial filing, we explained that the Guidelines allow for the inducement of molting via starvation ("forced molting"), contrary to consumer perception of animal care. The UEP now argues that because the Guidelines have been amended to allow for alternatives

<http://www.poultryandeggnews.com/poultrytimes/news/September2003/245671.html>;
<http://animalscience.ucdavis.edu/Avian/UEPeconmemo702.pdf>. (Forecasts price increases due to new guidelines via higher industry compliance and smaller supply which means higher prices and higher farm incomes.)

⁷ USDA Economic Research Service, Livestock, Dairy, and Poultry Outlook Report, September 2003, at <http://www.thepoultrysite.com/FeaturedArticle/FATopic.asp?AREA=Markets&Display=70>.

⁸ The program which very slightly increases cage space over a six-year period, with the final size of 67 square inches of cage space per bird, allows less than one-fourth the amount of space needed for the birds to flap their wings, according to the UEP's own scientific advisory panel. Laying hens require an average of 303 square inches to flap their wings. See Joy Mench, Ph. D., and Janice Swanson, Ph.D., "Developing Science-Based Animal Welfare Guidelines."

to forced molting, the surveys are flawed. The relevant fact is that the Guidelines still *allow* molting through starvation, and, because consumers assume that is not the case when they see the logo, the ads are deceptive.

Conclusion

This case is about the UEP's "Animal Care Certified" logo on millions of egg cartons nation-wide. It is not about the ACC program itself, nor any other aspect of the UEP's or Petitioners' work. Clearly, a reasonable consumer interpretation of the logo is that the birds are afforded a higher level of care than is actually the case. This is shown through multiple surveys, and it was the conclusion of the National Advertising Division of the Better Business Bureau.

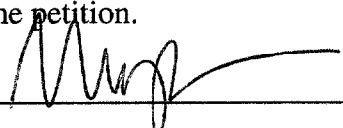
While benefiting from a long-term plan to reduce the nation's layer flock and increase the demand-to-supply ratio, the UEP has attempted to double dip by promoting the reduction of hens per cage as an intentional effort to improve hens' welfare and gain "conscious consumer" market share. The ACC program implies a significant change in the treatment of hens, but has resulted in little change.⁹

The UEP is misleading consumers by various forms of advertising, which the consumers reasonably interpret to claim the opposite of the conditions under which the products are actually produced. This is proven by the Petitioners' extensive research and evidence. The UEP cannot substantiate the claims, or otherwise justify the deception which it was likely aware would occur, and should desist from further deceptive advertising.

⁹ The program does not prohibit nor seriously alter the practices of purposeful starvation or beak burning. Given the nature of the phase-in period of the program, virtually no changes had been made when the program took effect, except one vital difference: Producers who signed on to the program could label their egg cartons with an "Animal Care Certified" (ACC) logo, giving themselves a halo of legitimacy for consumers concerned about animal cruelty.

Certification

The undersigned certifies, that, to the best knowledge and belief of the undersigned, this petition includes all information and views on which the petition relies, and that it includes representative data and information known to the petitioner which are unfavorable to the petition.

(signature) 

(name of petitioner) Miyun Park, President, Compassion Over Killing

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Exhibit 20

Survey by Zogby International

**Report on Egg Carton Study
Consumer Survey
Interviewer Guide and Instruction Sheet**



Date: January 21, 2004

To: Paul Shapiro

RE: Report on Egg Carton Study

Methodology

Two hundred and twelve (212) current or future egg purchasers were interviewed in face-to-face interviews in Chicago (102) and in California (110). These intercept interviews were conducted in areas frequented by egg purchasers. Participants were chosen at random and shown two egg cartons, one with an Animal Care Certified logo and one without the logo. The margin of error for 212 responses is +/-7 percentage points. Error margins are higher for sub-groups.

California Methodology: Fifty-nine interviews were conducted by two interviewers outside of a Safeway grocery store in Oakland, California, Tuesday, January 13 through Wednesday, January 14, 2004. Fifty-one interviews were conducted at the Oakland Flea Market by one interviewer Saturday, January 17 through Monday, January 19, 2004.

Chicago Methodology: One hundred and two interviews were conducted by one interviewer at R&R Grocery store, in Chicago, Illinois, Wednesday, January 14 through Thursday, January 15, 2004, with the bulk of interviews being conducted on Thursday.

Executive Summary

Respondents were more likely to believe that the Animal Care Certified logo indicates more humane care for the hens who laid those eggs. When shown two cartons, one with the logo and one without the logo, respondents were more likely to believe that eggs sold in cartons **without the logo** over those sold in cartons with the logo, indicated hens who are caged during the process. And, by more than two to one, respondents thought that eggs sold in cartons **with the logo** over those sold in a carton without the logo, meant that the hens were free-range or free-roaming.

Before respondents were asked any questions about how the hens are confined, by nearly two to one, respondents said they were more likely to purchase eggs sold in cartons **with the Animal Care Certified logo** than eggs in cartons without the logo, although one in three said they would purchase either.

After asking two questions regarding how hens are confined during the process, half say they are **more likely** to purchase eggs sold in cartons with the logo. This is nearly seven times as many who said they are **less likely** to purchase eggs in cartons with the logo, and twice as many who said it would make **no difference** which carton of eggs they would purchase.

Analysis

Do you buy eggs on a regular basis from a retail establishment?

Yes	94%
No	5
Don't Know	1

Do you plan to buy eggs from a retail establishment in the future?

Yes	94%
No	1
Don't Know	6

When purchasing eggs, do you buy only specific types of eggs?

Yes, free range/free-roaming/organic eggs	9%
Yes, other*	21
No	64
Don't Know	7

Other: Large (17); Brown (6); Extra large (7); Grade A (4); Chicken eggs (2); Grade B; Large natural; Rosebud Farms; White jumbo

Two in three (64%) participants say they do not buy specific types of eggs, while one in five (21%) say they do. Just under one in ten (9%) say they purchase free range, free-roaming, or organic eggs. Seven percent are not sure.

The interviewer has just shown you two cartons. Please keep those cartons in mind when answering the following questions.

*After looking at the two cartons carefully, which of these two – A or B – would you be **Most Likely** to purchase?*

A (with logo)	32%
B (without logo)	17
Both	34
Neither	5
Not sure	13

About one in three (34%) egg purchasers say they would purchase both eggs sold in a carton with the Animal Care Certified logo and eggs sold in a carton without the logo. Nearly twice as many participants say they would be most likely to purchase the eggs sold in a carton with the logo as would be most likely to purchase eggs in a carton without the logo (32% with logo vs. 17% without logo). One in twenty (5%) say they would purchase neither and 13% are not sure.

Why did you choose that way? (In response to the immediate previous question.)

A

The eggs are better	10%
Because of the logo	9
The animals are taken care of	5
They're the type I prefer	2
They're the same/No difference	1
Just the packaging	1
Other	3
Not sure	1

B

The eggs are better	4%
Just the packaging	3
The animals are taken care of	2
Because of the logo	1
They're the same/No difference	1
They're the type I prefer	1
Other	2
Not sure	0

Both

They're the same/No difference	26%
The eggs are better	1
They're the type I prefer	0
Other	2
Not sure	4

Neither

They're the same/No difference	2%
They're the type I prefer	1
Other	1
Not sure	1

Not sure

They're the same/No difference	7%
Because of the logo	0
The eggs are better	0
They're the type I prefer	0
Other	0
Not sure	3

Five percent of those who chose carton A (with the logo) say they did so because it means the animals are taken care of, while 10% say it is because the eggs are better quality. Two percent chose carton B (without the logo) because they believed animals were taken care of, and 4% because the eggs are better.

Are you familiar with the Animal Care Certified logo and what it means?

Yes	3%
No	79
Don't know	18

Nearly four in five (79%) say they are not familiar with the logo and 18% are not sure.

(For Questions 7-11 – The interviewer will show you both cartons again.)

What does the logo on Carton A mean to you? (In response to being shown both cartons a second time.)

The animals are cared for	44%
Better/Healthier eggs	17
They are certified	6
Other	9
Nothing	13
Not sure	11

A plurality of participants (44%) say the logo means that the hens are cared for, while following a distant second are the 17% who say they think it means better or healthier eggs.

*Between A and B (above), which eggs are **More Likely** to have been laid by hens kept in cages?*

A (with logo)	26%
B (without logo)	40
No difference	11
Don't know	24

Two in five respondents (40%) say they believe that the cartons without the Animal Care Certified logo are more likely to contain eggs that were laid by hens kept in cages, while slightly more than one in four (26%) believe the cartons with the logo are more likely laid by hens kept in cages. One in ten (11%) say that they believe there is no difference, and one in four (24%) are not sure.

*Between A and B (above), which eggs are **More Likely** to have been laid by free-range/free-roaming hens?*

A (with logo)	46%
B (without logo)	19
No difference	9
Don't know	27

Nearly half (46%) of participants believe that eggs sold in the cartons with the logos are more likely to have been laid by free-range or free-roaming hens. Just under one in five (19%) believe eggs sold in the carton without the logo have been laid by free-range hens, while just under one in ten (9%) believe there is no difference. More than one in four (27%) are not sure.

Are you less likely or more likely to purchase eggs with the "Animal Care Certified" logo over the carton without the logo?

Less likely	7%
More likely	50
No difference	25
Don't Know	18

Half of respondents (50%) say they are more likely to purchase eggs sold in cartons with the Animal Care Certified logo, while 7% say they are less likely. One in four (25%) say the logo would make no difference and 18% are not sure.

Why did you make that choice? (In response to immediate previous question)

Less Likely

A better product	3%
Because of the logo	2
I don't know what the logo means	1
Not sure	1

More likely

Animals are cared for	22%
A better product	21
I don't know what the logo means	1
Because of the logo	1
Doesn't matter/No difference	1
Other	3
Not sure	2

No difference

Doesn't matter/No difference	14%
The price	4
A better product	2
I don't know what the logo means	1
Other	2
Not sure	3

1. Do you buy eggs on a regular basis from a retail establishment?

1. Yes

2. No

3. Don't Know

2. Do you plan to buy eggs from a retail establishment in the future?

1. Yes

2. No

3. Don't Know

3. When purchasing eggs, do you buy only specific types of eggs?

1. Yes, free range/free-roaming/organic eggs

2. Yes, other (Please specify what type: _____)

3. No

4. Don't Know

The interviewer has just shown you two cartons. Please keep those cartons in mind when answering the following questions.

4. After looking at the two cartons carefully, which of these two – A or B – would you be **Most Likely** to purchase?

1. A

2. B

3. Both

4. Neither

5. Not sure

5. Why did you choose that way? _____

6. Are you familiar with the Animal Care Certified logo and what it means?

1. Yes (Thank you for participating in the survey. Please hand the questionnaire back to the interviewer.)

2. No

3. Don't know

(For Questions 7-11 – The interviewer will show you both cartons again.)

7. What does the logo on Carton A mean to you? _____

8. Between A and B (above), which eggs are **More Likely** to have been laid by hens kept in cages?

1. A

2. B

3. No Difference

4. Don't Know

9. Between A and B (above), which eggs are **More Likely** to have been laid by free-range/free-roaming hens?

1. A

2. B

3. No Difference

4. Don't Know

10. Are you less likely or more likely to purchase eggs with the "Animal Care Certified" logo over the carton without the logo?

1. Less likely

2. More likely

3. No difference

4. Don't Know

11. Why did you make that choice? _____

Thank you for your time! Now I just need some personal information to complete the survey. Your personal information will be maintained only for purposes of the survey, and will not be distributed or used in any other than way.

NAME: _____

ADDRESS: _____

CITY: _____ STATE: _____ ZIP CODE: _____

EMAIL: _____

SIGNATURE: _____ DATE: _____

Make sure that you clearly circle the correct answer on the participant's survey. The following questions serve merely as a guide. Make sure you indicate which carton you present first, then second to the participant in the upper right hand corner of the questionnaire.

Read the introduction and first three questions to consumers who wish to participate:

Hello. My name is _____ and I am doing a brief consumer survey. Do you have a few moments to answer some questions.

1. Do you buy eggs on a regular basis from a retail establishment?

1. Yes

2. No

3. Don't Know

2. Do you plan to buy eggs from a retail establishment in the future?

1. Yes

2. No (Thank and end)

3. Don't Know (Thank and end)

3. When purchasing eggs, do you buy only specific types of eggs? (If respondent says yes only, ask what kind of eggs)

1. Yes, free range/free-roaming/organic eggs (Thank and end)

2. Yes, other (Please specify what type: _____)

3. No

4. Don't Know

Interviewer: If the consumer is not qualified to continue, please thank him or her for their time and proceed with the next consumer. If the consumer is qualified to participate, please hand him or her the survey to complete. Explain to the participant that you will be showing him or her two cartons and ask them to complete the survey keeping those cartons in mind.

After the participant has the survey in hand and is ready to continue, please show both cartons to the participant, being careful to alternate the cartons so that one participant will see the logo carton first and the non-logo carton second, while the next participant will see the cartons in the reverse order: non-logo carton first and the logo carton second, and so on, continuing to alternate cartons as stated above for the duration of the survey. **REMEMBER TO REMOVE THE CARTONS FROM SIGHT BEFORE THE PARTICIPANT STARTS ANSWERING THE SURVEY.**

A. [carton with logo]

B. [carton without logo]

Record the carton order – A or B first; A or B second – in the upper right hand corner of the participant survey.

Participant answers the following questions in his or her own hand.

4. After looking at the two cartons carefully, which of these two – A or B – would you be **most likely** to purchase?

1.A

2.B

3. Both

4. Neither

5. Not sure

5. Why did you choose that way? _____

6. Are you familiar with the Animal Care Certified logo and what it means?

1. Yes (Thank you for participating in the survey. Please hand the questionnaire back to the interviewer.)
2. No
3. Don't know

At no time answer any questions specific to the cartons. If the consumer wants to know what the logo means, explain that you do not know and are testing his or her knowledge about the logo.

Show both cartons again, showing the carton with the ACC logo (Carton A) to the participant before he or she answers question 7.

7. What does the logo on Carton A mean to you? _____

8. Between A and B, which eggs are **More Likely** to have been laid by hens kept in cages?

- | | | | |
|------|------|------------------|---------------|
| 1. A | 2. B | 3. No Difference | 4. Don't Know |
|------|------|------------------|---------------|

9. Between A and B, which eggs are **More Likely** to have been laid by free-range/free-roaming hens?

- | | | | |
|------|------|------------------|---------------|
| 1. A | 2. B | 3. No Difference | 4. Don't Know |
|------|------|------------------|---------------|

10. Are you less likely or more likely to purchase eggs with the "Animal Care Certified" logo over the carton without the logo?

- | | | | |
|----------------|----------------|------------------|---------------|
| 1. Less likely | 2. More likely | 3. No difference | 4. Don't Know |
|----------------|----------------|------------------|---------------|

11. Why did you make that choice? _____

Thank you for your time! Now I just need some personal information to complete the survey. Your personal information will be maintained only for purposes of the survey, and will not be distributed or used in any other than way.

NAME: _____

ADDRESS: _____

CITY: _____ STATE: _____ ZIP CODE: _____

EMAIL: _____

SIGNATURE: _____ DATE: _____

Exhibit 21

**Decision of the National Advertising Division
of the Better Business Bureau**

(Case #0000 DM)

UNITED EGG PRODUCERS, INC.

Animal Care Certified Eggs

Advertising Agency: *In-house*
Challenger: *Compassion Over Killing, Inc.*
Product Type: *Food Products*
Issues: *Implied Claims*
Disposition:

- **An advertiser is responsible for substantiating all reasonable interpretations of its advertising, including those it may not have intended to convey.**

Basis of Inquiry: Compassion Over Killing, Inc. ("COK"), an animal advocacy organization, challenged the truth and accuracy of the "Animal Care Certified" logo appearing on egg carton packaging and other advertising for eggs. The certification mark and logo, which reads, "Animal Care Certified" was developed by the United Egg Producers, Inc. ("UEP"), a trade association for the egg producing industry, as part of a certification program based upon new animal husbandry guidelines designed to facilitate the comfort, health and safety of egg-producing hens. COK challenged the truthfulness of the certification mark, as it appears on egg cartons, as well as the use of the mark in advertising, in conjunction with the use of the term "humane," by various egg producers that participate in the UEP program.

Challenger's Position: COK contended that the "Animal Care Certified" logo that UEP licenses for use on egg cartons and other advertising is misleading because it leads consumers to believe that the eggs are produced under caring and humane conditions by free roaming hens when that is not the case. In fact, argued COK, the eggs bearing the "Animal Care Certified" mark are produced by hens that are force molted through starvation, have their beaks partially removed without anesthesia and live in such crowded cages that they are unable to flap their wings. According to COK, the "Animal Care Certified" mark appeals to consumers who care about the treatment of animals, however, those consumers are deceived because the eggs appear to be produced under caring and humane conditions but, in fact, are not.¹

¹ According to COK, the American Humane Association found that 44% of consumers would pay five percent more for food labeled "humanely raised."

The Animal Care Certification Program

COK explained that the Animal Care Certification (“ACC”) program was funded by the American Egg Board, which published animal husbandry guidelines based on recommendations by its Scientific Advisory Committee. Under the program, egg producers and retailers nationwide can sell eggs labeled with an “Animal Care Certified” logo demonstrating their participation in the program and apparent adherence to the guidelines. However, argued COK, participants are considered “certified” without significantly altering husbandry practices and their eggs bear the seal “Animal Care Certified” even though the hens that produced them are not treated humanely. In fact, noted COK, the Scientific Advisory Committee that enacted the animal husbandry guidelines does not characterize the recommended level of treatment as “humane.”²

Under the ACC program, observed COK, an egg producer can receive the Animal Care Certification even though it crowds its hens together allowing each hen space that is less than the equivalent of a letter-sized piece of paper, engages in forced molting through starvation³, cause hens to lose up to 30% of their body weight, and engages in partial removal of their beaks without anesthesia.⁴ COK argued that egg producers may use the “Animal Care Certified” seal without significantly altering their husbandry practices because the program essentially codifies current husbandry practices and, where it does not, “phase in allowances” apply. COK provided various expert opinions of animal scientists and veterinarians who believe that forced molting, confined cage space and beak trimming absent anesthesia are not humane and are detrimental to the animals’ welfare.

Consumer Perception of the ACC Certification Mark

The “Animal Care Certified” logo, according to COK, is misleading because it communicates a level of care and humane treatment of hens that is not consistent with the actual conditions permitted by the guidelines for egg-laying hens. According to COK, the “Animal Care Certified Seal” constitutes an express claim that the hens producing the

² In a press release the Humane Society of the United States announced that the UEP guidelines seemed designed to mollify consumers rather than address the “extreme animal welfare abuses that have become the norm in this industry.”

³ COK explained that the purpose of forced molting, a process that involves starving hens, is to manipulate the egg-laying cycle.

⁴ As support, COK documented conditions in ACC-certified facilities, including photographs depicting ill and injured hens covered in feces, some having lost many feathers and sharing cramped cage space with dead hens.

eggs are “well cared for” and that this fact has been “certified.”⁵ The ACC “certification” implies that the eggs are certified by a an official government agency without referencing a “certifying organization.” Moreover, argued COK, the use of the term “certified” in conjunction with the term “care” conveys the impression that egg producers provide affirmative attention or assistance to animals, a level of care certified by a government agency. COK contended that this misrepresentation is compounded by the omission of material information regarding the actual inhumane conditions under which the hens are kept.

As further support for its position on the message conveyed by the seal, COK conducted a ten-question survey among 165 egg consumers in Washington, D.C. The results, according to COK, demonstrated that the “Animal Care Certified” seal led consumers to believe that the eggs bearing the seal are produced by hens that are free roaming, are not intentionally starved and do not have their beaks removed without anesthesia.

Moreover, argued COK, a Zogby poll of U.S. consumers showed that: 75.4% of respondents found it unacceptable to starve hens to induce molting, 86.2% found it unacceptable to densely crowd hens in cages and 90.4% found that partially removing hens’ beaks was unacceptable. Because consumers find these conditions unacceptable, contended COK, the ACC standards do not represent a significant improvement in the hen’s treatment, notwithstanding the message communicated by the seal. The “Animal Care Certified” representation suggests a set of “humane” conditions inconsistent with the actual conditions permitted under the seal program.

A more recent Zogby poll interviewed 1,208 adults nationwide regarding the perception of the “Animal Care Certified” logo. When asked what the phrase “Animal Care Certified” means, 18% of those surveyed responded “treat chickens humanely/being kind to chickens” and another 13% answered “animals are cared for.” Four percent said “government regulated/certified” and two percent said the chickens are “free range.” According to the survey, a majority of respondents did not believe that keeping hens in small wire cages (in space less than an 8 1/2 x 11 inch sheet of paper) was allowed for hens laying “Animal Care Certified” eggs. This survey evidence, argued COK, provided additional proof that the use of the ACC seal is false and misleading advertising.

⁵ COK cited a recent USDA Food Safety and Inspection Service (FSIS) publication stating that the term “certified” implies official inspection and evaluation. FSIS’s “Meat and Poultry Labeling Terms,” updated January 2001 (www.fsis.usda.gov/oa/pubs/lablterm.html); Backgrounder “Using the Claim ‘Certified Organic By...’ on Meat and Poultry Product Labeling,” updated March 2, 2000 (www.fsis.usda.gov/oa/background/organic.html) ; Federal Register: April 12, 1999 (Volume 64, Number 69). The use of the term, contended COK, also violates USDA policy. See 21 USC 1037(e)(1).

Advertiser's Position: United Egg Producers ("UEP") is an egg industry trade association representing a majority of egg producers nationwide. It explained that the ACC program and certification mark are the result of a scientific process designed to produce standards for improving the living conditions of egg-laying hens. Neither the program nor the seal, contended UEP, are misleading, but rather support guidelines designed to improve the comfort, health and safety of chickens.

The Animal Care Certification Program

The UEP based its animal husbandry guidelines on recommended improvements suggested by an independent Scientific Advisory Committee for Animal Welfare convened in 1999 to review the treatment of egg-producing hens. The guidelines, asserted UEP, included the following improvements:

- Increased cage space per hen, a process phased in over time to prevent market disruptions;
- Standards for molting procedures based on the most current verified scientific studies;
- Standards for trimming chick's beaks, when necessary, to avoid pecking and cannibalism;
- Maintaining constant supply of fresh feed, water and air ventilation throughout the chicken house and monitoring for ammonia;
- Standards for daily inspection of each bird as well as proper handling and transportation; and
- Availability of a new training video to instruct producer staffs on the proper handling of chickens to avoid injury to the animals.

UEP explained that more than 80% of the egg production industry currently participates in the ACC program.⁶

UEP maintained that as a trade association, it is not an "advertiser" and does not engage in national advertising of the ACC seal or program, nor does it sell eggs to consumers. The certification mark "Animal Care Certified" is used by individual egg producers under license from UEP provided the producers comply with program guidelines and submit to

⁶ Participating producers are audited yearly through an independent certification program executed by the USDA Agricultural Marketing Service ("AMS") or the American Registry of Professional Animal Scientists ("ARPAS").

periodic audits. UEP asserted that it does not engage in advertising of the ACC program and that the use of the ACC mark does not constitute false advertising.⁷

Consumer Perception of the ACC Certification Mark

Notwithstanding its jurisdictional objections, UEP defended its seal as truthful and accurate. UEP argued that the express or implied representation conveyed by the ACC logo is that the production methods of ACC eggs comply with UEP husbandry guidelines. It maintained that an independent group of scientists and veterinarians have concluded that those guidelines and recommendations are appropriate and humane.⁸ The conclusions of the Scientific Advisory Committee, argued UEP, provide a reasonable basis for asserting that ACC egg production practices are humane.

UEP criticized COK's consumer survey as unscientific, consisting of leading questions, and argued that it is not reasonable to conclude, as COK does, that consumers will assume ACC eggs to be free-range or organic. In response to the 2003 Zogby poll, UEP noted that only 2% thought the term "Animal Care Certified" implied that the chickens are free range. The majority of the polled consumers responded that they were not sure what the ACC program was and that the ACC logo was unlikely to influence their purchasing decisions.

UEP also disagreed with COK's definition of the terms "care" and "certified" respectively. COK suggests that "care" refers to *affirmative* assistance. UEP referred to a Black's Law Dictionary definition of "care" as "watchful attention; concern; custody..."⁹ Under the animal husbandry guidelines, producers are instructed to "facilitate optimal daily care and inspection of the birds." Moreover, UEP disagreed that the term "certified" implies government sanction or other official connection. It explained that the ACC logo is a certification mark, established and sanctioned by the Lanham Act.¹⁰

DECISION:

⁷ Citing 15 U.S.C.A. § 55.

⁸ Specifically, according to UEP, the Scientific Advisory Committee determined that the production guidelines provide "a solid base from which to reassure the public that they are practicing good management and care for their birds."

⁹ Black's Law Dictionary 193 (5th ed. 1979).

¹⁰ 15 U.S.C.A. § 1127. Under Federal Statute, Certification Marks certify that goods or services of others meet certain standards established by the owner of the mark.

Jurisdiction

As an initial matter, NAD considered whether UEP, an industry trade association, was an “advertiser” within the meaning of *NAD Procedures* § 1.1. Under the Procedures, “the term ‘national advertising’ shall include any paid commercial message in any medium (including labeling)...if it is disseminated nationally or to a substantial portion of the United States.”¹¹ Although UEP, as a trade association, does not sell eggs to consumers, the “Animal Care Certified” logo is a commercial message that it licenses to egg producers and industry members for use on egg cartons and in other advertising for the purpose of selling eggs directly to consumers. A seal program is designed to communicate to consumers that the product has been certified and meets a certain standard of performance, safety or quality - in this case a standard of “animal care.” An organization that promotes a seal program, or allows a seal to be used in labeling or advertising of a product, is responsible for the accuracy of the message conveyed by the seal.¹² Moreover, the fact that UEP is a trade association does not mean that the messages it disseminates in the market place are not commercial speech, and does not preclude NAD from exercising review when the message disseminated was intended to communicate information at the point of sale to consumers buying eggs.¹³ Consequently, NAD determined that it was proper to exercise jurisdiction over the challenge and that the claim “Animal Care Certified” was national advertising appropriate for review within the self-regulatory forum.

The Animal Care Certification Program

NAD, the advertising industry’s self-regulatory forum does not take a position on the humaneness or adequacy of animal husbandry guidelines for egg laying flocks. The standards and the actual conditions of the hens, however, is relevant to the inquiry because the ACC seal communicates information to consumers about the “care” of the hens.

¹¹ Generally, packaging and labeling claims are subject to NAD’s jurisdiction. *Amden Corporation (Smile White Tooth Whitening System)*, Case #4048 *NAD Case Reports* (May 2003).

¹² *In re National Association of Scuba Diving Schools, Inc.*, 100 F.T.C. 439 (1982).

¹³ *National Commission on Egg Nutrition v. Federal Trade Commission* (7th Cir.1977) 570 F.2d 157, 159, cert. den. (1978) 439 U.S. 821, 99 S.Ct. 86, 58 L.Ed.2d 113.). *Nuclear Energy Institute*, Case #3508, *NAD Case Reports* (November 1998) (“Advertising that touches on political or social issues may nevertheless be subject to NAD review for truthfulness and accuracy where the challenged claims appear in an advertising format, reference a product that consumers can purchase, and the advertiser has an economic motive for the advertisement”).

The UEP Guidelines recommend increased space for hens grouped together in cages, recommending that the space allowance should be in the range of 67 to 86 square inches of usable space per bird. However, under the “phase in” allowance, egg producers are not required to reach the space of 67 inches until 2008. COK noted that the average space allowance currently is 48 square inches and that while an increase to 67 inches marks an improvement, it is insufficient space for hens to flap their wings or perform normal behaviors.¹⁴ The Guidelines further permit beak trimming without anesthesia in order to reduce pecking and cannibalism among the birds, a practice that is painful to hens and impacts normal animal behavior. The Guidelines also provide standards for molting, a practice whereby the hens are deprived of food and water in order to manipulate the egg-laying cycle. The Guidelines note that fasts of longer than 5 days will give superior results but recommends that producers monitor body weight loss and mortality.

Consumer Perception of the ACC Certification Mark

NAD recognizes that seal or certification programs are powerful tools for communicating information to consumers and can influence purchasing decisions. The issue for NAD in this challenge is to determine what reasonable message is conveyed by the “Animal Care Certified” mark, which appears on participating producers’ egg cartons, and whether the message is truthful and not misleading.

UEP maintained that the representation conveyed by the “Animal Care Certified” logo is that the production methods of ACC eggs comply with UEP animal husbandry guidelines. The logo however, does not contain any reference to UEP, the animal husbandry guidelines or other information about the meaning of the seal. Moreover, it is well established that an advertiser is responsible for substantiating all reasonable interpretations of its advertising, including those messages it may not have intended to convey.¹⁵ Clearly one reasonable interpretation of the “Animal Care Certified” logo is that a more humane level of care (recognized by *some* authoritative body) has been provided for the hens that produced the eggs in the carton bearing the seal. NAD

¹⁴ COK noted that Dr. Joy Mench, who served on the Scientific Advisory Committee described the space allowance as “meager.”

¹⁵ The Federal Trade Commission articulated this principle in its Policy Statement on Advertising Substantiation: “...Although firms are unlikely to possess substantiation for implied claims they do not believe the ad makes, they should generally be aware of reasonable interpretations and will be expected to have prior substantiation for such claims.” 48 Fed. Reg. 10,471 (1984).

concluded that the level of “care” permitted under the UEP Guidelines did not match the message of care communicated by the “ACC” logo.¹⁶

The only extrinsic evidence of consumer perception was offered by the challenger, COK. First, COK relied upon a survey it conducted of 165 egg consumers in the Washington D.C. NAD agreed with UEP’s criticisms of this survey and found the methodology to be flawed and the closed-ended questions to be leading and heavily biased. Consequently it did not provide reliable evidence of consumer perception. NAD did not rely on it in reaching its conclusions. Of greater probative value was the Zogby poll of 2003, which involved a considerably larger and randomized sample and a more objective sequence of questions. When subjects were asked what “Animal Care Certified” means, a majority (53%) were unsure or responded that they had never seen the logo before. However, 18% of those surveyed responded “treat chickens humanely/being kind to chickens” and another 13% answered “animals are cared for.” Two percent responded that the hens are “free range.” A significant percentage of respondents (33%) offered their understanding that “Animal Care Certified” refers to humane treatment or a certain level of care or concern for animal welfare.

It is undisputed that the animal husbandry guidelines established by UEP represent an improvement in the overall treatment of egg-producing hens in the United States. NAD determined however, that those improvements did not correspond with the level of care reasonably communicated by the logo “Animal Care Certified.” The word “care” may be susceptible to more than one meaning, but NAD determined that the logo does not accurately represent the level of care that is communicated to a substantial number of consumers. With respect to the question of what “care” means, NAD believes that the advertiser’s reliance on the Black’s Law Dictionary definition is misplaced and not a good measure of common consumer understanding of the term.¹⁷

NAD agreed with UEP that the ACC logo does not necessarily convey the message that the egg-laying hens are “free range” or that the term “certified” means *government* certified. Nevertheless, NAD determined that the “animal care” message conveyed by the ACC logo was misleading. The Zogby poll of 2003 indicated that a substantial number of respondents did not believe that “Animal Care Certified” eggs were produced by hens subjected to forced molting, confinement in very crowded wire cages, and debeaking practices which are permitted under the UEP animal husbandry guidelines. Moreover, an

¹⁶ Although NAD limited its review to the “Animal Care Certified” logo itself, its findings may be applicable to the use of the logo in advertising claims made by egg producers that appear in other media.

¹⁷ In contrast, The American Heritage College Dictionary includes “Caution in avoiding harm or danger” and “Attentive assistance or treatment to those in need” under the definition of “care.”

earlier Zogby poll (taken in 2000) indicated that a majority of the subjects polled found such practices unacceptable. The issue for NAD is not however, whether these practices are scientifically or ethically acceptable or whether COK's animal welfare concerns are justified or if they are frivolous, as UEP contended. The issue is one of communication. NAD determined that one reasonable message conveyed by the "Animal Care Certified" logo is that the hens that produce the eggs in cartons bearing the seal are treated to a more humane level of care than that which is in fact afforded by the animal husbandry guidelines. Accordingly, consumers concerned about the treatment of animals may purchase eggs in cartons bearing the seal under the misimpression that the hens that laid the eggs were treated to higher level of "care" than is actually the case.

NAD has no objection to UEP's desire to communicate its recommendations and guidelines for improved conditions to consumers. However, the message conveyed by the UEP "Animal Care Certified" claim is considerably broader than one that merely informs consumers that production methods of ACC eggs comply with UEP animal husbandry guidelines. The "Animal Care Certified" logo does not convey information about the meaning of the seal. Moreover, the emphasis on "animal care" is likely to mislead consumers on an issue that is evidently increasingly important to their purchasing decisions. Consequently, NAD recommends that the use of the "Animal Care Certified" claim be discontinued.

CONCLUSION: NAD recommended that "Animal Care Certified" claim be discontinued because it conveys a message of humane treatment that does not accurately reflect the actual level of care provided under the certification program.

ADVERTISER'S STATEMENT: UEP absolutely and utterly rejects the NAD's decision and seeks referral to the National Advertising Review Board. NAD's decision amounts to little more than the imposition of the NAD's sensibilities regarding animal husbandry practices upon the UEP. The NAD has permitted itself and its process to be hijacked by an extreme vegan group of animal rights activists whose tactics admittedly include criminal trespass and destruction of personal property and whose stated objective is not consumer protection but the elimination of all forms of commercial egg production. Significantly, the New York Attorney General's Office has recently declined to act on a virtually identical petition filed by COK.

The NAD's decision is fatally flawed in a number of material respects. The key to its decision is a poll conducted at the COK's request by Zogby International. Our appeal papers will describe these flaws in depth. The poll includes questions steeped with value-laden terms designed to provoke an emotional response, such as "force-molted through

starvation” and “caged so tightly that they cannot stretch their wings.” In the most shocking example of the poll’s obvious bias, the poll suggests to the respondent that eggs produced under the Animal Care Certified logo are treated worse than eggs produced with no logo when the NAD acknowledges that the opposite is true. In short, the poll is transparently designed to produce the result sought by COK and cannot be the basis for a rational analysis of what this logo suggests. Moreover, NAD misreads the poll, stretching it to support conclusions that do not follow from the poll results.

In addition to these significant substantive problems, the dispute between COK and UEP is not subject to NAD jurisdiction, because UEP is not an “advertiser” for purposes of the NAD policies and procedures.

In effect, the NAD has become a partisan in the COK campaign to eliminate eggs from the human diet.

Exhibit 22

**Letter Submitted to *The Washington Post* Editor by
United Egg Producers Scientific Committee Member Adele Douglass**

September 11, 2003

Letter to the Editor
The Washington Post
Via e-mail

Dear Editor,

Some information reported by David Montgomery in his article, "Animal Pragmatism" (September 8, 2003, Page C1), needs clarification as it relates to Humane Farm Animal Care (HFAC) standards. Rather than advocating "keeping chickens cage-free whenever possible," HFAC standards do not allow cages. We believe a hen needs room to move around, flap her wings and behave as a hen would. The hallmark of our standards is that farm animals live in surroundings that allow them to act naturally.

In my role as a member of the United Egg Producers Scientific Committee, the only housing system reviewed was cages, since more than 99.9 percent of laying hens in the U.S. that are, in fact, caged. What I said to Mr. Montgomery is that I have no problem supporting an increase in cage size because this would give the hens some relief.

We do agree with Paul Shapiro of Compassion Over Killing that the meaning of the United Egg Producers' "American Care Certified" label should be explained to consumers. HFAC's Certified Humane label is clearly defined: "Meets HFAC standards, which include nutritious diet without antibiotics or hormones, animals raised with shelter, resting areas, sufficient space and the ability to engage in natural behavior."

Sincerely,

Adele Douglass
Executive Director
Humane Farm Animal Care
Herndon, Virginia

Exhibit 23

Letter from the Office of the Attorney General of New York State



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ELIOT SPITZER
Attorney General

September 29, 2003

DIVISION OF PUBLIC ADVOCACY
CONSUMER FRAUDS & PROTECTION BUREAU

Ms. Molly Graver
55 Payson Avenue, Apt 3K
New York, NY 10034

Our File Number: CFA03A04231
Company: United Egg Producers

Dear Ms. Graver:

We have received a response to your complaint. Despite our efforts, the company has refused to make any refund or other adjustment.

We regret that we cannot assist you further. In the case of individual complaints, our role is limited to that of mediator. Mediation is a voluntary procedure and we are not empowered to make judgments of fact. Therefore, we cannot force a settlement. Only a court may determine what rights you have in this matter.

Small Claims Courts are the most convenient forums in which to file suit. In New York State, you may sue in Small Claims Court for up to \$3,000 plus interest and court costs. Also, you must file a Small Claims suit in the county where the defendant resides, is employed or has an office. An attorney may represent you but is not required.

Free assistance in preparing a Small Claims case is available from the New York Public Interest Research Group ("NYPIRG"). The telephone numbers for NYPIRG's Small Claims Court Action Center are: Albany (518) 442-5658, New York City (212) 349-6460.

If you wish to consult a private attorney and would like a referral, we suggest you call your county bar association or the New York State Bar Association's Lawyer Referral Service at 1-800-342-3661 for assistance. Typically, initial consultations are relatively inexpensive and do not commit you to further representation. Our office cannot represent consumers in court nor give individuals legal advice.

We regret that our efforts have not led to a resolution of your complaint. We will keep a record for future reference.

Very truly yours,

Julissa Nazario

Julissa Nazario, Mediator

Consumer Frauds and Protection Bureau

Exhibit 24

Letter from the U.S. Department of Agriculture Denying Jurisdiction



United States
Department of
Agriculture

Food Safety
and Inspection
Service

Washington, D.C.
20250

OCT 24 2003

Compassion Over Killing, Inc.
P.O. Box 9773
Washington, DC 20013

To Whom It May Concern:

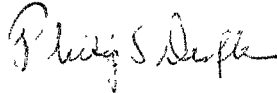
The Food Safety and Inspection Service (FSIS) has received your petition requesting that the Agency prohibit the use of the United Egg Producer's (UEP) "Animal Care Certified" logo on the labeling of shell egg cartons unless the labeling is modified in such a manner as FSIS may prescribe so that it is not false or misleading. In your petition you alleged that appearance of the UEP "Animal Care Certified" logo on the labeling of shell egg cartons falsely leads consumers to believe that the eggs inside were produced under "caring and humane conditions." We have reviewed the petition and have determined that FSIS lacks the legal authority to take the action that you are requesting. Therefore, we are denying your petition without evaluating the merits of the requested action.

In your petition, you assert that FSIS has the authority to prohibit false or misleading labeling of shell eggs by producers and retailers pursuant to section 7 of the Egg Products Inspection Act (EPIA) (21 U.S.C. 1036). Section 7 of the EPIA authorizes FSIS to, among other things, regulate the labeling of egg products at official egg processing plants to ensure that such labeling is not false or misleading. Under the EPIA, the term "egg product" means, with a few exceptions, "... any dried, frozen, or liquid eggs, with or without added ingredients ..." (21 U.S.C. 1033(f)). The EPIA defines the term "egg" as "...the shell egg of the domesticated chicken, turkey, duck, goose, or guinea" (21 U.S.C. 1033(g)). The language used in these definitions makes clear that the term "egg product," as used in the EPIA, does not apply to shell eggs. Furthermore, when these definitions are read together with section 7 of the EPIA, it is also clear that the authority to prevent false or misleading labeling of egg products in official plants does not extend to the labeling of shell eggs by producers and retailers.

The labeling of shell eggs (with the exception of labeling that indicates that refrigeration is necessary) is regulated by the Food and Drug Administration (FDA) under the authority of the Federal Food Drug and Cosmetic Act (FFDCA) (21 U.S.C. 301 et seq.) and Fair Packaging and Labeling Act (FPLA) (15 U.S.C. 1451 et seq.). Furthermore, section 23(c) of the EPIA states that the provisions of the EPIA shall not affect the applicability of the FFDCA, the FPLA or other Federal laws, to eggs, egg products outside of egg processing plants, or other food products or diminish any authority conferred on the Secretary of Health and Human Services (and the FDA by delegation) or other Federal officials by such laws (21 U.S.C. 1052(c)). Although, as stated in your petition, FSIS and FDA both have a role in regulating shell eggs, section 23 of the EPIA makes it clear that any authority granted to FSIS by the EPIA over the labeling of egg products cannot diminish FDA's authority to regulate the labeling of shell eggs.

FSIS has contacted FDA regarding your petition and was informed that the FDA has also received the petition. Therefore, any future inquiries regarding your petition should be directed to the FDA. If you have any further questions concerning our denial of your petition, you may contact Mary Porretta, Petition Manager, at (202)720-5627.

Sincerely,

A handwritten signature in cursive script, appearing to read "Philip S. Derfler".

Philip S. Derfler
Assistant Administrator
Office of Policy and Program Development